No. 788

In the Supreme Court of the United States

OCTOBER TERM, 1958

L. WALTER HENSLEE, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (Pet. 26-35) is reported at 262 F. 2d 750.

JURISDICTION

The judgment of the Court of Appeals was entered on January 14, 1959, and a petition for rehearing was denied on February 26, 1959. The petition for a writ of certiorari was filed on March 23, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the counts of the indictment charging the making of false reports to the Public Housing Administration, with intent to defraud, sufficiently apprised petitioner of the nature of the offenses.

2. Whether, where a defense witness was questioned on cross-examination as to a prior statement which the witness admitted and explained, it was error to deny a request to government counsel for the document used by government counsel in framing his question when the document had not been used to refresh the memory of the witness and was not in evidence.

3. Whether the court improperly questioned the witness.

4. Whether petitioner was prejudiced by a joinder on the trial of the false reporting counts which were affirmed, with two counts charging him with receiving compensation with intent to defraud the Public Housing Administration which were reversed for failure to state a federal offense.

5. Whether venue of the crime of causing false reports to be filed with the Public Housing Administration can be laid in the district where the false reports were prepared and mailed.

STATUTES INVOLVED

18 U.S.C. 1012 provides:

> Whoever, with intent to defraud, makes any false entry in any book of the Public Housing Administration or makes any false report or statement to or for such Administration; or

Whoever receives any compensation, rebate, or reward, with intent to defraud such Administration or with intent unlawfully to defeat its purposes; or

Whoever induces or influences such Administration to purchase or acquire any property or to enter into any contract and willfully fails to disclose any interest which he has in such property or in the property to which such contract relates, or any special benefit which he expects to receive as a result of such contract—

Shall be fined not more than $1,000 or imprisoned not more than one year, or both.

18 U.S.C. 3237 provides:

Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

Any offense involving the use of the mails, or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matter moves.

STATEMENT

After a third jury trial, petitioner was convicted under six counts of the indictment, four of which (counts 2, 3, 4, and 6) charged him with causing false reports to be filed with the Public Housing Administration with intent to defraud, and two of which (counts 1 and 5) charged him with receiving compen-

sation with intent to defraud the Public Housing Administration, all in violation of 18 U.S.C. 1012.[1] On appeal to the Court of Appeals, that court reversed petitioner's conviction under counts 1 and 5 on the ground that no federal crime had been proved, but affirmed his conviction under counts 2, 3, 4 and 6 (Pet. 26-35).

Petitioner was sentenced to concurrent sentences of one year's imprisonment on each of counts 2 and 3, to run consecutively with the concurrent sentences of one year's imprisonment under counts 4 and 6. In addition, petitioner was fined $1000 on each of these four counts (R. 503-504).

The evidence in support of the judgment, the substantiality of which is not challenged, may be summarized as follows:

During the period from 1940 to December 1955, petitioner was the executive director of the Housing Authority of the city of Galveston, Texas (R. 73). During this period, the Galveston Housing Authority (hereinafter referred to as G.H.A.) entered into a contract with the Public Housing Administration, an agency of the federal government which assists local housing agencies by loans and grants, or annual con-

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[1] The original indictment contained two additional counts, a seventh charging him with receiving illegal compensation in violation of 18 U.S.C. 1012, and an eighth charging him with falsifying a material fact concerning a vehicle, in violation of 18 U.S.C. 1001. On the first trial of this case, petitioner was acquitted under count seven and in the course of the trial the government counsel moved to dismiss as to count eight. A mistrial resulted on the remaining six counts when the jury failed to agree. On the second trial of this case, a verdict of guilty was handed down on the remaining six counts, which was subsequently reversed by the Court of Appeals because of prejudicial publicity at the time of the trial. *Henslee* v. *United States*, 246 F. 2d 190 (C.A. 5).

tributions, to construct low cost housing in slum clearance areas (R. 33). Petitioner consulted with the Public Housing Administration in the negotiation of the contracts (R. 277). The standard procedure of the Public Housing Administration is to advance up to 90% of the estimated cost of land acquisition, construction, and completion of the low cost housing project. The money thus advanced to develop the project is eventually repaid by the local housing authority to the federal government through the sale of 40-year bonds (R. 34-37).

In addition to the initial outlay, however, the Public Housing Administration, in order to promote the sale of these bonds at a low interest rate, obligates itself to underwrite them through annual contributions or subsidies to the local housing authority, which are not repaid, to cover the accrued interest and principal on the bonds as they become due. The contract also provides that, prior to the computation of the federal subsidy, any net operating profits realized by the local authority, such as profits from the sale of excess lands, investments or rents, be first applied to the payment of the principal and interest of the bonds, thereby diminishing, to that extent, the annual contribution made by the Federal Housing Administration (R. 38, 41-42, 281; Gov. Ex. 1). Both the development costs and the annual contribution are computed on the basis of reports and statements submitted by the local housing authority to the federal agency as required by contract (R. 66-67; Gov. Ex. 1, Secs. 309, 310). Any fraudulent misuse of net operating profits (which are not reflected on these reports to the federal authorities) would therefore have the effect of increasing the con-

tribution of the federal government in that amount (R. 39, 182-183, 197-198).

In connection with the development of the Galveston projects, the G.H.A. purchased two "off-site" properties to be used to relocate families evacuated from the clearance area—1619 Avenue M and 1015-30th Street (R. 76-78). These properties thus became part of the project aided by federal subsidy pursuant to the contract between the federal authority and the G.H.A. (R. 99). After the acquisition of the lots in 1952, an apartment was moved to the 30th Street lot and a house to the Avenue M property, both being taken from the subsidized clearance area by purchase through the F.H.A. development fund (R. 83-84, 88, 280; Gov. Exs. 4, 5, 7). Extensive repairs on these houses were also made by the Verkin Building Specialties Company and the Galveston Brickote Company from the same fund (R. 89-98, 280; Gov. Exs. 8-14).

After the two "offsite" houses were completed, they were rented by the G.H.A. (R. 102). During the period from April 2, 1952, to June 30, 1955, the rental proceeds were placed in separate accounts in banks, one under the designation, "L. Walter Henslee, Special Account", and the other, the "L. Walter Henslee, Trust Account". Only petitioner had power to write checks on the special account (R. 103-104, 106, 117, 273; Gov. Ex. 15). The development director, Mr. Haglund, who kept the special books and records on these two accounts, was specifically instructed by petitioner not to show these books to the Public Housing Administration auditors or to let them know that such books were in existence (R. 105-107).[2] Government

[2] Mr. Haglund testified on the trial that he turned the books pertaining to the "Special Account" back to petitioner in June

witnesses testified that none of the rentals from these two properties were reported in the regular books and records of the G.H.A., either those pertaining to the federally subsidized projects or unsubsidized projects (R. 105, 226, 273). The books of the G.H.A., in fact, reflected that these two properties were vacant (R. 276). While thus concealing these funds, the petitioner began applying them to his own use and to the use of two companies in which he had an interest (R. 168, 176-177, 232, 238-240; Gov. Exs. 17, 18, 21, 23, 24, 28, 29, 30, 36, 37, 38, 39).

Since the G.H.A. books did not show these rental receipts, the receipts were not reflected in the reports filed with the Public Housing Administration, including the four reports that are the subject of counts 2, 3, 4 and 6 of the indictment (R. 275). Miss Ford, the accountant for the G.H.A. (R. 203), testified that, after she or members of her staff prepared these reports from the regular books and records of G.H.A., she submitted them to petitioner for his approval before mailing them to the Public Housing Administration (R. 205-206). As a result of the nondisclosure, the amount of the rental income was not applied to reduce the project debt, and the federal subsidy was proportionately greater than it should have been (R. 182-183, 197-199; Gov. Exs. 31-34).

In 1955, an auditor of the Public Housing Administration discovered the existence of the rental income received from the two properties (R. 270-271). He determined that a total of $6,025.71 had been collected

1955 when the misapplication of the funds in the account was discovered (R. 104). He also testified that the check stubs reflecting expenditures from this account had been subsequently changed to reflect justifications for various expenditures out of the account (R. 109).

from rentals on the two properties (R. 272) which was not reflected in the books of the G.H.A. (R. 273) or in the reports submitted to the Public Housing Administration (R. 274-275).

The defense called as its witness a former commissioner of the Galveston Housing Authority, Mr. Sonderup, who testified on direct examination that he knew of the existence of a special account which had been set up to receive the income from "off-site" properties (as opposed to improvements in the clearance area itself). He explained that while provision had been made for the handling of income from site properties, none had been made for income from "off-site" properties (R. 338-339). Thereafter, on cross-examination he was questioned by government counsel concerning a prior statement to investigators that he did not "know anything about the L. Walter Henslee special account, to which was deposited earnings from rentals at 1015 30th, rear" (R. 347). The witness explained that the statement would be literally true since he could not identify the address given (R. 347).

On redirect examination, defense counsel, addressing himself directly to government counsel, said (R. 348-349) "Let me have this thing, please, this statement"—apparently indicating a memorandum or paper that government counsel had referred to in framing his questions concerning petitioner's prior statements to the investigators. The court then commented, "I don't know that you are entitled to examine it, Counsel. He has not offered it in evidence" (R. 349). No further request was made either to the court or to government counsel. In response to questions by defense counsel, the witness repeated his explanation that he knew Mr. Henslee had a special ac-

count to take care of rentals from "off-site" properties, but did not know the addresses (R. 349). The court asked why it was that the witness was unable to deny making a prior contrary statement, and the witness said "Well, I wonder if it wasn't the same question, Judge." The court then said "Well, read it again, just so there may be no uncertainty". Defense counsel then said that the witness had given a sworn statement and the court replied: "I think Counsel is entitled to cross-examine any way he wants to." (R. 350). Immediately thereafter, at the start of re-cross examination, government counsel again asked the witness whether on August 18, 1955, he had made the quoted statement that "I do not know anything about the L. Walter Henslee special account, to which was deposited earnings from rentals" (R. 350-351). The court started to question the witness about the inconsistency, and there was some confusion as to the off-site property (R. 351-352). The court then said that witness could give any explanation he wanted to as to his prior statement. The witness then repeated his prior explanation that he knew there was a special account for income from off-site properties but did not know where the money from a particular address was deposited (R. 352).

ARGUMENT

1. Petitioner contends that the counts of the indictment upon which his conviction was affirmed (counts 2, 3, 4, and 6) were legally insufficient in that each of these counts, after alleging that he had with intent to defraud caused a designated false report to be made to the Public Housing Administration, went on to state that the falsity consisted of failing to report on

such forms amounts of money "which had theretofore been collected as rent from houses located at 1015 30th Street and/or 1619 M Street, Galveston, Texas, within Project No. TEX-17-4". He contends that use of "and/or" renders the indictment too indefinite to enable him to prepare his defense, or to plead double jeopardy in the event of a second prosecution for the same offense (Pet. 12-14).

Petitioner has been tried three times under these same counts, and failed at all times to demand a bill of particulars. He clearly had no difficulty in preparing his defense. Moreover, all the essential elements of the crime of making false reports to a federal agency were described with particularity. The indictment stated the gravamen of the crime in each case and specifically identified the reports and the figure omitted from the reports. The fact that, by way of descriptive detail, it explained that the amount was derived as rentals from either one or both of two described premises located "within Project No. TEX. 17-4", the technical description of a federally-aided housing project, does not render it vague for any purpose.

The gist of the offense charged is causing false reports to be filed, and the method by which the crime was perpetrated was the intentional omission from the report of specific amounts of income derived from the federally subsidized project. Whether that income was derived from one building or another, or both (as was actually the case), is an evidentiary matter which may be averred in the alternative. *Crain* v. *United States*, 162 U.S. 625, 634-636; *Heflin* v. *United States*, 223 F. 2d 371, 373 (C.A. 5); *Bianchi* v. *United States*, 219 F. 2d 182, 195 (C.A. 8), certiorari denied, 349 U.S. 915.

2. Petitioner asserts error in the failure of government counsel to turn over to him the document which was used by the government in framing questions on cross-examination of the defense witness Sonderup (see the Statement, *supra*, p. 8).

It is doubtful that the point was properly preserved. When petitioner asked government counsel directly for the document, the court expressed doubt whether counsel was entitled to its since the government had not offered it in evidence. (The court could have also pointed out that the document had not even been shown to the witness.) Defense counsel did not then offer any argument as to why he should receive the statement and never renewed his request when the witness was questioned about the one sentence in his prior statement, on direct examination.

In any event, there was no reason to turn over the document. This was a *defense* witness whose testimony the defense was not entitled to, and did not wish to, impeach; neither *Jencks* v. *United States*, 353 U.S. 657, nor the "Jencks" Act (18 U.S.C. 3500) applies. The document was not used to refresh the recollection of the witness. Cf. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 233; *Little* v. *United States*, 93 F. 2d 401, 406 (C.A. 8). There was no issue as to whether the prior statement was in fact knowingly made or made in the form ascribed to the witness, necessitating resort to documentary evidence for its resolution. Compare: *Cafasso* v. *Pennsylvania R. Co.*, 169 F. 2d 451 (C.A. 3); *United States* v. *Corry*, 183 F. 2d 155, 157 (C.A. 2). The witness in this case admitted the statement and reaffirmed its truthfulness under oath, but then went on to explain that it was not inconsistent with his testimony given on direct

examination by defense counsel. Contrary to petitioner's assertion (Pet. 15), the prior statement could not be introduced by the defense as substantive evidence to prove consistency. *Conrad* v. *Griffey*, 11 How. 480, 490-492; *Ellicott* v. *Pearl*, 10 Pet. 412, 439-440; *United States* v. *Sherman*, 171 F. 2d 619, 622 (C.A. 2); *National Postal Transport Ass'n* v. *Hudson*, 216 F. 2d 193, 199-200 (C.A. 8).

All that is involved was one sentence of the prior statement relating specifically to matters testified to by the witness on direct examination as a defense witness. The defense had succeeded in thus limiting the basis for impeachment (see R. 341-345). Had the witness disputed the fact that he had made the prior statement, or that he had knowingly made it, a different case might be presented. But here the defense could not introduce the text into evidence since the witness admitted the prior statement and did not seek to qualify it, but rather reaffirmed and explained it.

3. Petitioner's contention that the trial judge improperly injected himself into the trial to ask the witness questions concerning the consistency between his prior statement and his testimony on trial (Pet. 20-21) has no justification. The court asked a few questions eliciting the witness's explanation of why there was no inconsistency between the statements. The court was confused at one point about the relevancy of "off-site" property but then told the witness to give any explanation he wished (R. 351-352).

4. Petitioner alleges that he was prejudiced by the fact that the false report counts upon which his conviction was affirmed (counts 2, 3, 4, and 6) were tried together with counts 1 and 5 charging him with receiv-

ing compensation with intent to defraud the Public Housing Administration, conviction under which was reversed by the Court of Appeals (Pet. 21-22). The reversal of the latter counts, however, in no respect discredited the substantial body of evidence found sufficient by the Court of Appeals to prove the former. Nor is there any validity in petitioner's assumption that evidence was admitted under the reversed counts which would have been inadmissible in a trial under the good counts (Pet. 22). The evidence tending to show that petitioner applied to his own use the money deposited in the special account would have been germane to the trial of the affirmed counts to show intent. Such evidence would have shown that failure to include in the reports information concerning income from "off-site" rentals was deliberate.

5. Petitioner also asserts as a question presented (Pet. 4), but does not argue, the issue of venue. Obviously, venue of the offense of causing false reports to be made to the Public Housing Administration can, as the Court of Appeals held (Pet. 31), be laid pursuant to 18 U.S.C. 3237 either in the Southern District of Texas or in the District of Columbia since the false report was prepared and mailed in the former district and received and filed in the latter. See: *United States* v. *Miller*, 246 F. 2d 486, 488 (C.A. 2); *De Rosier* v. *United States*, 218 F. 2d 420 (C.A. 5), certiorari denied, 349 U.S. 921. There was no reason to try this case in Washington, D. C. when all the active steps with respect to the fraud occurred in Texas.

CONCLUSION

For the foregoing reasons we respectfully submit that the petition for a writ of certiorari should be denied.

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